No. 84-1087

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CLEVESTER DAVIS, JIMMIE LEE KING, and VIRGINIA KING,

Cross-Petitioners,

v.

AVCO FINANCIAL SERVICES, INC.,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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---

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Cross-Respondent Avco Financial Services, Inc. (hereinafter "AFS"), opposes the cross-petition for a writ of certiorari because there are no special or important reasons warranting this Court's review of the three questions presented.

STATEMENT OF THE CASE

AFS respectfully refers the Court to the Statement of the Case contained within AFS' own Petition in Case No. 84-901. That provides an objective, neutral, and accurate description of the proceedings below.

THE CROSS-PETITION SHOULD BE DENIED

I. There Is No Reason – Particularly In This Case – For This Court To Decide Once Again What Constitutes A Security

Cross-petitioners seem to want this Court to define once again what constitutes a "security" for the purposes of the federal securities laws. As even they observed, it has done so repeatedly in the past. *See* Cross-Petition at p. 9 and cases cited therein. *See also International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979); *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 301 (1946).

Cross-petitioners have failed to present a single reason why this Court should go through that exercise yet again. The test is well-settled, and its application necessarily differs with the facts of each particular case. *See Marine Bank* v. *Weaver*, 455 U.S. 551, 560 n. 11 (1982). That circumstance, however, does not mean that each new set of facts in each new case warrants or justifies this Court's review.

The simple fact is: Cross-petitioners have not and could not have contended that the unanimous holding of the Sixth Circuit on the question presented was in conflict with a decision of any other Circuit or of this Court. It is not, and cross-petitioners do not maintain that it is.

What, then, is the purpose for this Court's review? Cross-petitioners seem to suggest that this Court should decide which "test" – the "risk capital" or the "commercial-investment dichotomy" – should apply in determining whether notes made by an individual when borrowing money are securities. However, they do not say which "test" is right, which is "wrong," or which supports their view of the case.

These glaring omissions are understandable. Within the context of individual loans, the analytical distinction cross-petitioners discuss is one of semantics rather than substance. *Compare Amfac Mortgage Corp.* v. *Arizona Mall of Tempe*,

Inc., 583 F.2d 426 (9th Cir. 1978) (risk capital), *with*, *McGovern Plaza Joint Venture* v. *First of Denver Mortgage Investors*, 562 F.2d 645 (10th Cir. 1977) (commercial-investment dichotomy) (both cases holding that instruments evidencing a construction loan were not securities). And, under either "test," documents evidencing individual loans are not securities. *See Union Planters National Bank of Memphis* v. *Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (risk capital); *Great Western Bank & Trust* v. *Kotz*, 532 F.2d 1252 (9th Cir. 1976) (risk capital); *National Bank of Commerce of Dallas* v. *All American Assurance Company*, 583 F.2d 1295 (5th Cir. 1978) (commercial-investment dichotomy); *C.N.S. Enterprises, Inc.* v. *G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975) (commercial-investment dichotomy); *Lino* v. *City Investing Co.*, 487 F.2d 689 (3rd Cir. 1973) (commercial-investment dichotomy); *Chemical Bank* v. *Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 253, 83 L. Ed. 2d 190 (1984) (all "tests").

In short, cross-petitioners want this Court to decide an issue which necessarily would not affect the result below. That has never been a reason for issuing a writ of certiorari.

II. There Is No Reason – Particularly In This Case – For This Court To Decide Whether Recklessness Is Sufficient For Liability Under § 10(b) Of The Securities Act Of 1934 And Rule 10b-5 Promulgated Thereunder

Cross-petitioners' second question presented for this Court's review is:

> Whether under certain circumstances reckless behavior is sufficient for civil liability under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

By the nature of this question, one would presume (1) that cross-petitioners presented evidence sufficient for a finding of recklessness, but (2) that the Sixth Circuit, in a decision conflicting with that of one or more other Circuits or of this Court, held that recklessness was insufficient for liability under Rule 10b-5. However, neither circumstance exists here. The majority opinion states:

> Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 provide a private action remedy roughly equivalent to that existing for fraud at common law. This remedy is not limited to "sellers," but applies also to persons collaterally involved in the transaction who made misrepresentations to promote the sale of securities with the requisite scienter. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976). In this circuit recklessness may constitute the required scienter. *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1023 (6th Cir. 1979); *Ingram Industries* v. *Nowicki*, 502 F. Supp. 1060, 1066 (E.D. Ky. 1980). However, the trial judge found neither deliberate fraud nor recklessness on the part of Avco or its manager. Therefore, plaintiff's 10b-5 allegations were not supported by the evidence at trial.*

---

* *See* Appendix A to AFS' Petition in Case No. 84-901 at pp. 10a-11a. Chief Judge Lively concurred in this holding. *See* Petition in Case No. 84-901 at p. 23a.

Thus, the "question" cross-petitioners present does not exist in this case. Whether recklessness is or is not sufficient for liability under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 would not affect or be determinative of the result below. Fundamentally, cross-petitioners want an "advisory opinion." That is hardly a reason for issuing the writ.

Cross-petitioners' real point seems to be that they disagree with the decision of the District Judge and the three judges of the Sixth Circuit that there was insufficient evidence to support a finding or conclusion of recklessness. In other words, all cross-petitioners want is a determination by this Court that Judges Lively, Jones, Bertelsman, and Walinsky did not sufficiently or correctly examine, weigh, or review the evidence in this case.

Once again, that is not a reason warranting the issuance of a writ. This Court does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). *See also Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 447 (1959) (Frankfurter, J., dissenting).

III. The Unpublished Order Denying The Motion To Dismiss Presents No Important Or Significant Questions

Cross-petitioners' final question pertains to the Sixth Circuit's unanimous decision and order denying their motion to dismiss the appeal. On this cross-petition for a writ of certiorari, the fundamental question is whether the Sixth Circuit decision under attack is "of importance to the public as distinguished from that of the parties . . ." *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923)).

By its terms, the order denying cross-petitioners' motion is

only of significance to the parties to this case. It is an unpublished decision expressly governed by Sixth Circuit Rule 24 which provides in pertinent part:

> (a) *Criteria for Publication*
>
> (1) It is the policy of the court that the following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:
>
> > (i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
> >
> > (ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
> >
> > (iii) whether it discusses a legal or factual issue of continuing public interest;
> >
> > (iv) whether it is accompanied by a concurring or dissenting opinion;
> >
> > (v) whether it reverses the decision below, unless:
> >
> > > (a) the reversal is caused by an intervening change in law or fact, or,
> > >
> > > (b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
> >
> > (vi) whether it addresses a lower court or administrative agency decision that has been published; or,
> >
> > (vii) whether it is a decision which has been reviewed by the United States Supreme Court.
>
> (2) *Designation for Publication.* There shall be a presumption in favor of publication of signed and per curiam

> opinions. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.
>
> (b) *Citation of Unpublished Decisions.* Citation of unpublished decision by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

Cross-petitioners are complaining about what is essentially a housekeeping order. On its face, it presents no question or issue of importance. Under the Sixth Circuit's own procedural rules, it has little if any precedential value. In the circumstances, it most assuredly does not warrant the attention of this Court.

Cross-Petitioners seek to make the question one of general importance by saying that this procedural order conflicts with *Ackermann* v. *United States*, 340 U.S. 193 (1950). But no conflict exists.

In *Ackermann* this Court held that Civil Rule 60 does not provide relief from a party's own " 'free, calculated, deliberate choice' not to appeal." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (*quoting Ackermann*, 340 U.S. at 198). *See also Parks* v. *U.S. Life & Credit Co.*, 677 F.2d 838, 840 (11th Cir. 1982) ("An unsuccessful litigant may not rely on appeals by others and share in the fruits of victory by way of a Rule 60(b) motion.").

However, when a litigant has *not* freely or deliberately decided not to appeal, Civil Rule 60 "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949). Accordingly, Civil Rule 60 can appropriately result in an extension of the time for appeal when special circumstances exist and no

prejudice results to the opposing party. *See e.g., Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978); *Fidelity & Deposit Co.* v. *Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974).

This Court has stated that rulings under Civil Rule 60 are reviewable "only for abuse of discretion." *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978). That is the sole question cross-petitioners have raised: Did the District Judge and then the three judges of the Sixth Circuit abuse their discretion? Fundamentally, all cross-petitioners want is this Court to review the same record as the Sixth Circuit for an alleged abuse of discretion. That is no reason for issuing a writ.

In any event, there was no abuse here. There was no evidence or even a contention that AFS made a "free, calculated, or deliberate choice" not to appeal and, therefore, this Court's holding in *Ackermann* is inapplicable. All that occurred was a minor error in a timely filed notice of appeal.

The facts are: (1) Avco Corporation and all of its subsidiaries, including AFS, were represented by the same attorneys in the District Court; (2) at the conclusion of plaintiffs' case, all defendants were dismissed except for AFS and Lee McCormick; (3) the District Court's findings of fact and conclusions of law dismissed Lee McCormick and left AFS as the *only* defendant; (4) judgment was entered against "Avco"; and (5) the attorneys for Avco Corporation and its subsidiaries filed a timely notice of appeal.

This whole matter is nothing more than a tempest in a teapot. During oral argument before the Sixth Circuit, cross-petitioners' counsel acknowledged that he knew that AFS was the only remaining defendant and that defense counsel had obviously intended that AFS be the appellant. In short, there was no prejudice here. The District Judge found only

one defendant liable; the attorneys for that defendant filed a timely notice of appeal; and the plaintiffs, through their counsel, knew who was really appealing.

The designation of Avco Corporation as appellant in the notice did not in these circumstances deprive cross-petitioners of fair notice of the appeal. The original notice was sufficient, and the error could have been corrected in the court of appeals. *Harrison* v. *United States*, 715 F.2d 1311 (8th Cir. 1983) (court of appeals mandate recalled and amended to include party whose name was inadvertently omitted from notice of appeal in consolidated cases); *United States* v. *Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983) (government's notice of appeal from dismissal of indictment held not defective as to defendants omitted from notice caption when government "plainly demonstrated an intention to appeal from the entire order").

As with their first two, cross-petitioners' third question does not and cannot impact anyone but the parties to this case. Fundamentally, all cross-petitioners seek is a review of the record to determine whether the four judges below abused their discretion. The cross-petition should be denied.*

---

* Cross-petitioners, AFS submits, are hardly in a position to argue timeliness before this Court. All petitions for rehearing were denied by the Sixth Circuit on September 7, 1984. AFS petitioned this Court on December 5, 1984 for a writ to review the judgment and opinion of the Sixth Circuit in favor of cross-petitioners and against AFS [1a]. AFS did not petition from the order denying cross-petitioners' motion to dismiss [3a.] The time for petitioning to this Court is ninety days after a Circuit's denial of a petition for rehearing or thirty days after an earlier petition from the same judgment or order. *See* 28 U.S.C. § 2101(c); Supreme Court Rule 20. The "cross-petition" here was filed on January 2, 1985 — well beyond the ninety-day limitation.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

NOS. 82-3553
82-3572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 10, 1984]

CLEVESTER DAVIS; JIMMIE LEE KING; and VIRGINIA ANN KING,

Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO FINANCIAL SERVICES, INC.,

Defendant-Appellant,
Cross Appellee,

LEE McCORMICK,

Defendant.

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and BERTELSMAN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that this case is affirmed with regard to the findings of liability of certain class members under § 12(2) and reversed and remanded for further proceedings indicated in this opinion.

Each party is to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN, Clerk

ISSUED AS MANDATE: September 17, 1984
COSTS: None

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court.
This notice is to be *prominently* displayed if this decision is reproduced.

82-3553
82-3572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 10, 1984]

CLEVESTER DAVIS; JIMMIE LEE KING;
and VIRGINIA ANN KING,
Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO FINANCIAL SERVICES, INC.,
Defendant-Appellant,

LEE McCORMICK,
Defendant.

ORDER

Before: LIVELY, Chief Circuit Judge, JONES, Circuit Judge, and BERTELSMAN, District Judge*

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* Hon. William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

This securities fraud case was initiated in 1973. The original defendants included Avco Financial Services, Inc. and other Avco subsidiaries and affiliates, which were separate corporate entities.

Trial began before District Judge Walinski of the Northern District of Ohio on August 3, 1979. At the conclusion of the plaintiffs' case, the other Avco subsidiaries and affiliates were dismissed, leaving only Avco Financial Services, Inc. and its manager Lee McCormick as defendants.

On March 30, 1981, the district court entered its judgment in favor of the plaintiffs for $167,072.57 against "the defendant AVCO."

On April 29, 1981, defendants' counsel filed its notice of appeal. The notice stated that "[n]otice is hereby given that defendant AVCO Corporation" appealed from the district court's March 30th judgment. In June 1981 the plaintiffs filed a motion with this court to dismiss "AVCO Corporation's" appeal for lack of jurisdiction, since "AVCO Corporation" had prevailed at the district court level and therefore lacked standing to appeal.

Defendants' counsel responded to the plaintiffs' motion to dismiss by filing two sets of motions, one with this court and another with the district court. Defendants requested this court to stay consideration of plaintiffs' motion to dismiss, to amend the April 29 notice of appeal to substitute "AVCO Financial Services, Inc." as appellant in place of "AVCO Corporation," and to remand the case to the district court to enable the district court to act upon defendants' F.R.Civ.P. 60(a) and (b) motions.

The defendants' Rule 60(a) and (b) motions filed with the district court requested that court to grant relief from its March 30th judgment, to correct the defendants' notice of appeal, to relieve the defendants from the proceeding of the notice of appeal, and/or to reconsider and vacate the

March 30th judgment. In July 1981, Judge Walinski filed an affidavit with this court that he was favorably disposed toward the defendants' Rule 60 motions.

This court dismissed "AVCO Corporation's" appeal in October 1981. We found that because Avco Corporation was not injured by the district court's judgment against Avco Financial Services, it lacked standing to appeal that judgment. We therefore ordered that Avco Corporation's appeal be dismissed for lack of jurisdiction. We further ordered that Avco Corporation's motions to remand the case to the district court, to amend the notice of appeal, and to stay consideration of plaintiff's motion to dismiss were *denied as moot.* (emphasis supplied).

Following this court's disposition of Avco Corporation's appeal, defendants renewed their Rule 60(b) motions before the district court. In August, 1982 the district court granted those motions. Accordingly, the district court vacated its March 30, 1981 judgment, and on August 16, 1982 entered a nearly identical revised judgment in plaintiff's favor against "defendant AVCO Financial Services, Inc." Defendants subsequently filed a timely notice of appeal from the district court's August 16th amended judgment.

DISCUSSION

Plaintiffs now argue that Avco Corporation's April 29, 1981 notice of appeal deprived the district court of jurisdiction to rule on defendants' Rule 60 motions and it was therefore an abuse of discretion for that court to enter its revised order of August 16, 1982. Plaintiffs contend that the district court in effect improperly used Rule 60 to perfect the defendants' appeal and therefore the appeal is improper and this court lacks jurisdiction because the appeal was not timely under Rule 4 of the Rules of Appellate Procedure.

We find that the district court acted within its discretion

under F.R.Civ.P. 60(a) in correcting what was essentially a clerical error in the March 30, 1981 judgment. Rule 60(a) permits a district court to correct mistakes in judgments on the motion of any party or on its own initiative.

During the pendency of an appeal after an appeal is docketed, under Rule 60(a) a district court may make corrections with the leave of the appellate court. Under the facts of this case, we previously found that this court lacked jurisdiction over Avco Corporation's purported appeal. Thus, in retrospect, the district court regained jurisdiction over this case and acted within its discretion in amending the March 30th judgments since there was no longer any appeal pending before this court once Avco Corporation's appeal had been dismissed.

Since the district court's revised judgment of August 16, 1982 was within its discretion, defendants' August 30, 1982 notice of appeal was timely under Rule 4 of the Rules of Appellate Procedure. Accordingly, we overrule plaintiffs' motion to dismiss the appeal of Avco Financial Services, Inc.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk